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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 09/755,408      | 01/05/2001  | Robert I. Nurse      | 7903ML              | 5236             |

27752 7590 07/17/2007  
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| EXAMINER |
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CASTELLANO, STEPHEN J

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| ART UNIT | PAPER NUMBER |
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3781

|           |               |
|-----------|---------------|
| MAIL DATE | DELIVERY MODE |
|-----------|---------------|

07/17/2007

PAPER

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/755,408  
Filing Date: January 05, 2001  
Appellant(s): NURSE, ROBERT I.

**MAILED  
JUL 17 2007  
GROUP 3700**

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David K. Mattheis  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed May 10, 2007 appealing from the Office action mailed August 30, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

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**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

**Patents:**

|           |                  |        |
|-----------|------------------|--------|
| 6,253,943 | SPYKERMAN et al. | 7-2001 |
| 5,622,276 | SIMMONS          | 4-1997 |
| 5,392,945 | SYREK            | 2-1995 |

**Prior Art Admissions:**

The following statement made on page 4, lines 10-14 of appellant's specification:

**“The floor pan 22 may be domed convex inwardly to increase strength as is known in the art. Particularly, domed floor pans 22 provide increased strength for loading by the contents of the container 10 in a direction normal to the plane of the floor pan 22. Alternatively, the floor pan 22 may be disposed convex outwardly, although this may decrease stability when the container 10 rests on a horizontal surface.”**

**Official Notice Now Being Treated as Prior Art Admissions:**

The non-final action mailed April 13, 2006 states, "Official notice is taken that plural finger grip notches are well known," on page 3, second paragraph from bottom, fourth sentence.

The final action mailed August 30, 2006, at the sentence bridging pages 3 and 4 and the first full sentence of page 4, states:

"The Official notice taken in the Office action mailed April 13, 2006 that plural finger grip notches are well known has not been challenged in applicant's July 12, 2006 response. Therefore, the Official notice is being treated as a prior art admission."

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

**Issue 1:**

Claims 21-26 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Simmons in view of Syrek.

Simmons discloses a container 10 having a plurality of upstandable sidewalls (the upstandable sidewalls of liner 28) interconnected by a floor pan (the floor portion of liner 28), at least one upstandable reinforcing panel (one of the pair of sidewalls 20) releasably connected to at least one of the sidewalls (at nipple 38 and port 40 connections), the sidewall is reinforceable with the upstanding reinforceable panel, the reinforceable panel being releasable from the sidewall without separation from the container (the reinforceable panel separates from the sidewall at the nipple/port connections while remaining connected to the container at a hinged

connection adjacent the bottom edge of the reinforceable panel so that the panel may fold horizontally when the container is collapsed as shown in Fig. 2). The floor 14 of Simmons' outer container 12 is rigid and appears to be entirely flat and entirely planar. Since the floor pan (floor portion 28 of liner 28) and liner 28 of Simmons is a flexible plastic-like, fluid impermeable material, this material may not be self-supporting and would conform to the shape of any surface that supports it. Therefore, the floor pan (liner) would conform to the entirely flat and entirely planar upper surface of floor 14 (outer container). Simmons fails to disclose a domed floor (outer container) and domed floor pan (liner).

**Please note that the domed floor is supported at page 4, lines 10-14 of applicant's specification wherein it has been stated that "the floor pan 22 may be domed convex inwardly to increase strength as is known in the art." Such statement is construed as an admission by applicant that the domed floor is prior art.** In addition, Syrek teaches a domed floor 102 where the dome extends inwardly as shown in Fig. 3 and 6.

It would have been obvious to modify the shape of Simmons' entirely flat and entirely planar floor 14 (outer container) to be inwardly domed as taught by the prior art admission and Syrek to increase the load strength of the floor to prevent buckling, deformation or failure. As a consequence, the floor pan (liner) of Simmons' would conform to the shape of the upper surface of floor 14 (outer container) and the floor pan (liner) would be domed or domed shaped to correspond to the shape of the floor 14(outer container).

In addition, consider that the flexible material of liner 28 of Simmons may be self-supporting. Either with the floor 14 (outer container) being domed or without the floor 14 (outer container) being domed, the self-supporting flexible material of liner 28 will hold a domed shape

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with a domed shaped floor 14 (outer container) or with a entirely flat and entirely planar floor 14 (outer container). In this case of a self-supporting liner material, it would not be necessary to make the floor 14 (outer container) domed wherein the modification is applied directly to the floor pan (liner). Therefore, the floor pan is domed regardless of the shape of the floor 14 of the outer container.

Re claim 34, insofar as disclosed the present invention includes a floor pan support 48 articulably joined to the reinforceable panel 42. Simmons discloses a similar construction with floor portion 14 articulably joined to reinforceable panel 20, the reinforceable panel 20 is removably attachable to the outer surface of floor pan through an indirect connection of the reinforceable panel 20 to the sidewall of the liner which is connected to the floor of the liner.

Re claims 25 and 26, Simmons discloses the invention except for the opening in the port would not be considered a slot because a circular hole is not elongated. It would have been obvious to modify the circular hole and the correspondingly shaped nipple to be elongated to provide an alignment feature and to extend the length of engagement to make the connection stronger.

**Issue 2:**

Claims 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Simmons in view of Syrek as applied to claim 26 above, and further in view of Spykerman et al. (Spykerman).

The combination discloses the invention except for the notches. Spykerman teaches hand graspable notches 121, 131. It would have been obvious to add the notches to the reinforceable

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panel to provide easier grasping of the panel. The Official notice taken in the Office action mailed April 13, 2006 that plural finger grip notches are well known has not been challenged in applicant's July 12, 2006 response. Therefore, the Official notice is being treated as a prior art admission. It would have been obvious to modify the single hand notch to have a plurality of finger notches to enhance the comfort of the hand grip.

#### **(10) Response to Argument**

##### **Issue 1:**

The statement of rejection has been clarified to discuss that (1) in the case of a non-self-supporting liner material that the floor 14 of the outer container can be modified to be domed, the liner would be domed because it conforms to the shape of the floor 14, and (2) in the case of a self-supporting liner, the liner could be directly modified to be domed. The discussion of (1) resulted from applicant's remark that the liner 28 is a supple material when applicant has not provided such evidence from the written text of Simmons that suggests "supple." There may be some truth to applicant's statement that nothing in the Simmons reference teaches or suggests that the liner 28 is capable of holding a domed shape by itself because not enough is revealed about the liner material to suggest one way or the other a self-supporting material or a supple material (non-self-supporting).

The statement that the examiner may not use the liner to represent the claimed floor pan and also use the bottom of the container to also represent the same floor pan is not well understood. It is clear from the statement of rejection that the floor pan is the floor of the liner 28 and no reference is made to the floor pan also being the floor 14 of the outer container.



Appellant's statement that there is no motivation ... in the references themselves is not considered complete. It is what the references teach as a whole and the level of ordinary skill in the art that are considered in deciding the motivation to combine rather than only the references themselves.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant's statement that nothing teaches a weakness in design is not well taken. The references are not required to state any such weakness as it is understood that patentees who discuss the strengths of their design are disclosing usefulness that can be applied to motivational reasoning.

Appellant suggests that the height of a dome would reduce storage space. As taught in appellant's drawings (see Fig. 1-5), the dome is not visually noticeable. The slightest of a curve can form appellant's dome, wouldn't interfere substantially with internal storage volume and still provide the significant reinforcing effect sought. As shown in Syrek, in Fig, 3 and 6, the dome is slight and reduces the volume less than 15%.

The absence of any discussion in appellant's remarks of his prior art admission of the dome is particularly striking. The reference that is most explicit teaching of a domed floor pan is

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appellant's prior art admission that a domed floor pan is well known in the art. Yet, appellant refers to the references as if the references include only the cited art patents rather than the prior art admissions as well.

**Issue 2:**

Appellant discusses that Spykerman doesn't cure the deficiency of the Simmons-Syrek combination and that Spykerman doesn't teach the limitation of the underlying independent claim. This suggests that no argument is being brought forth rebutting the reasoning for combining Spykerman to address the specific limitations of claim 27. Therefore, no further discussion is deemed necessary.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.


**Response to Evidence Appendix**

Appellant doesn't cite any evidence to be considered on appeal.


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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

  
**Stephen J. Castellano**  
**Primary Examiner**

Conferees:

  
Anthony D. Stashick

  
Marc Q. Jimenez

**ANTHONY D. STASHICK**  
**SUPERVISORY PATENT EXAMINER**  
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